98-310

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

THE STATE INSURANCE FUND,

Petitioner,

vs.

KENNETH G.M. MATHER, TRUSTEE for the ESTATE OF SOUTHERN STAR FOODS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 507(a)(4) of the Bankruptcy Code gives a priority to claims for "contributions" to a debtor's "employee benefit plan." Debtor Southern Star Foods, Inc. provided workers' compensation benefits to its employees by procuring workers' compensation insurance from the State Insurance Fund, but failed to pay all insurance premiums incurred within the applicable statutory time period. Does the insurance that Southern Star procured for its employees constitute an employee benefit plan such that the Fund's claim for unpaid premiums is entitled to priority status under section 507(a)(4)?

STATEMENT PURSUANT TO RULE 29.6

Petitioner the State Insurance Fund has no parent company and no subsidiaries.

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STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on May 21, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1996).

STATUTORY PROVISIONS INVOLVED

Sections 507(a)(3) and (a)(4) of Title 11 of the United States Code provide as follows:

> (a) The following expenses and claims have priority in the following order:
>
> . . .
>
> (3) Third, allowed unsecured claims, but only to the extent of $4,000 for each individual or corporation, as the case may be, earned within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for —

> (A) wages, salaries or commissions, including vacation, severance, and sick leave pay earned by an individual; . . .
>
> (4) Fourth, allowed unsecured claims for contributions to an employee benefit plan —
>
> (A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only
>
> (B) for each such plan, to the extent of —
>
> (i) the number of employees covered by each such plan multiplied by $4,000[1]; less
>
> (ii) the aggregate amount paid to such employees under Paragraph (3) of this sub-section plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

STATEMENT OF THE CASE

A. Introduction

This case presents an important issue of unsettled federal bankruptcy law which has not previously been before this Court, namely, whether an insurer's claim against a debtor for unpaid workers' compensation insurance premiums is entitled to

1. Prior to October 22, 1994, this number was $2,000.

priority status under section 507(a)(4) of the Bankruptcy Code as a "contribution" to an "employee benefit plan." Resolution of this issue will have far-reaching ramifications for workers, employers and insurers. Virtually all fifty states have some type of mandatory workers' compensation system to protect workers injured on the job. Much of that protection is provided through workers' compensation insurance. Accordingly, as employers continue to suffer financial difficulties and seek the protection of the Bankruptcy Code, issues regarding the priority to be granted to workers' compensation insurers' claims will continually arise.

At present, there is no clear answer regarding how these claims should be treated. The United States courts of appeal which have considered this issue are divided; consequently, so are the many federal district and bankruptcy courts which have considered the issue. This results in similarly situated creditors being treated very differently in courts across the country, which violates the fundamental goal of the Bankruptcy Code to treat creditors equally. This division between the courts regarding the meaning of section 507(a)(4) also affects other frequently occurring issues, such as whether insurers' claims for premiums for health and life insurance are entitled to priority. The time has come for this Court to set a clear precedent on this issue.

This conflict affects far more than the insurance industry, it also affects the thousands of laborers whose employers provide them with insurance coverage. If an employer does not maintain that insurance by paying premiums as they become due, employees are (in most states) left completely unprotected if they become ill or are injured on the job, because in bankruptcy there may be no other source from which they can collect benefits. By paying premiums the employer secures for its employees the benefit of insurance for workplace illness or injury without regard to fault. The presence of a workers'

compensation insurance premium priority will — like all other employee benefit priorities — encourage insurance carriers to continue to do business with financially troubled employers, enabling them to retain employees and perhaps even avoid bankruptcy. Because of the importance of this issue, and the lack of uniformity in the application of section 507(a)(4), this Court should take this opportunity to settle these issues and interpret this statute.

In addition, this Court's guidance is particularly necessary due to the genesis of the statute in question. Section 507(a)(4) was enacted in direct response to the previous decisions of this Court in *United States v. Embassy Restaurant*, 359 U.S. 29 (1959), and *Joint Indus. Board v. United States*, 391 U.S. 224 (1968). According to legislative history, Congress intended to overrule the *Embassy* decision. In *Embassy*, this Court held that fringe benefits were not entitled to priority treatment as wages under section 507(a)(3) of the Code. In enacting section 507(a)(4), Congress chose to expand the priority and ensure protection for non-wage benefits such as insurance.

Because the statute affected and changed prior precedents of this Court, it is particularly important that the Court now take the opportunity to speak on this issue again. An interpretation of the statute from this Court will clarify its scope and its effect, and will serve to reestablish needed precedent in this formerly settled area of law.

B. Statement of Facts

Because the parties entered a Stipulation of Facts for Trial, filed July 19, 1996, none of the facts relevant to this case are in dispute. Debtor Southern Star Foods, Inc. contracted with the Fund for workers' compensation insurance coverage for the period between February 1, 1994, and November 17, 1994.

On November 17, 1994, Southern Star's workers' compensation insurance was canceled for non-payment of premiums. The parties stipulated that when the insurance was canceled, Southern Star owed the Fund $230,849.99 in unpaid premiums.

On December 23, 1994, several of Southern Star's creditors filed a petition for involuntary bankruptcy against it, under Chapter 7 of the Code. Pursuant to section 507(a)(4), to qualify for priority, a claim must have been incurred within 180 days of: (1) the petition date; or (2) the date the debtor ceases business, whichever occurs first. The parties have stipulated that $186,898.27 of the Fund's claim was incurred within this statutory time period, and that the amount of that portion of the claim is within the limits of subsection (B) of 507(a)(4). This is the only portion of the claim at issue.

C. Course of Proceedings.

The Fund timely filed a proof of claim in the bankruptcy case, asserting a priority, unsecured claim for unpaid workers' compensation insurance premiums. The Trustee objected, asserting that the claim was not entitled to priority, and requesting that the bankruptcy court allow the claim only as a general, unsecured claim. On October 10, 1996, the bankruptcy court entered an order sustaining the Trustee's objection and allowing the Fund's entire claim only as a general, unsecured claim. The basis for the bankruptcy court's jurisdiction over this claim was 28 U.S.C. § 157(b)(2)(A), (B), (O) (1996).

The Fund appealed the order, and the Bankruptcy Appellate Panel for the Tenth Circuit upheld the bankruptcy court on July 28, 1997. The Fund appealed this order as well, and on May 21, 1998, the United States Court of Appeals for the Tenth Circuit affirmed the Bankruptcy Appellate Panel's decision.

REASONS FOR GRANTING THE WRIT

I.

A CLEAR STATEMENT FROM THIS COURT ON THIS IMPORTANT ISSUE OF FEDERAL LAW IS NECESSARY BECAUSE THE UNITED STATES COURTS OF APPEAL WHICH HAVE CONSIDERED THE ISSUE HAVE REACHED CONFLICTING AND IRRECONCILABLE CONCLUSIONS.

A. The Decisions of the Courts of Appeal are in Direct Conflict.

The courts of appeal which have considered the status of claims for unpaid workers' compensation insurance premiums under the Bankruptcy Code have reached contradictory decisions, and this case presents this Court with the occasion to resolve this conflict and clarify this important and unclear area of law. An examination of these decisions and their underlying rationale illustrates the confusion regarding bankruptcy treatment of claims like the Fund's. The conflicting rationales used by the courts make it completely unclear how a claim for unpaid insurance premiums — whether for workers' compensation coverage or regular health insurance — should be treated under the Bankruptcy Code. One line of authority finds that such claims are clearly entitled to priority based on the plain language of section 507(a)(4), while another line finds they are clearly not entitled to such priority. Some language used by the courts indicates that in order for the claim to have priority, the insurance benefits for which premiums were charged must have been directly bargained-for by the employees they benefit. Still another line holds that claims for unpaid workers' compensation insurance premiums are entitled to priority as an excise tax, but only in certain limited circumstances, when charged by a state fund.

The following cases illustrate the irreconcilable conflict that has arisen between the differing conclusions reached on the application of section 507 by the Fourth, Sixth, Ninth and Tenth Circuit courts of appeal:

- In *Employer's Ins. of Wausau v. Plaid Pantries, Inc.*, the Ninth Circuit found that claims for workers' compensation insurance premiums *are* entitled to priority under § 507(a)(4). *See* 10 F.3d 605 (9th Cir. 1993).

- In *Employer's Ins. of Wausau v. Ramette (In re HLM Corp.)*, the Eighth Circuit found that the claims *are not* entitled to priority under section 507(a)(4), mainly because workers' compensation insurance coverage is mandated by statute. *See* 62 F.3d 224 (8th Cir. 1995). Although the court explicitly limited its holding to claims arising under the Minnesota workers' compensation scheme, courts following this decision routinely apply it without regard to the substance of state laws involved. *See, e.g.* the Tenth Circuit's decision in this case, 144 F.3d at 712.

- In *State Ins. Fund v. Southern Star Foods, Inc.*, the Tenth Circuit followed the erroneous reasoning of the Eighth Circuit and found that claims for workers' compensation insurance premiums *are not* entitled to priority, because, among other reasons, they are not *primarily* for the benefit of the employee. *See* 144 F.3d 712 (10th Cir. 1998).

- In *Yoder v. Ohio Bureau of Workers' Comp. (In re Suburban Motor Freight, Inc.)*, the court was not interpreting section 507(a)(4), but rather section 507(a)(7)(E), which provides priority to excise taxes. The Sixth Circuit found that claims of workers'

compensation insurers are entitled to priority status as an excise tax if they are state run, and if applicable state law requires employers to procure workers' compensation insurance from that entity rather than a private insurer. *See* 618 F.2d 159 (6th Cir. 1993).

- In *New Neighborhoods, Inc. v. West Virginia Workers' Comp. Fund*, the Fourth Circuit agreed with the Sixth Circuit's decision in *Suburban Motor*. *See* 886 F.2d 714 (4th Cir. 1989).

In addition to the conflict regarding the status of claims for workers' compensation insurance premiums, the courts' differing application of section 507 creates confusion about whether claims for any type of insurance premiums, including health insurance premiums, are entitled to a priority. The First Circuit has held that these claims are entitled to priority. *See In re Saco Local Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983). Other courts have held that they are not. *See, e.g., State Ins. Fund v. Kenneth G.M. Mather, Trustee*, 210 B.R. 838 (10th Cir. B.A.P. 1997).[2]

Although *In re Saco* did not deal with workers' compensation insurance premiums, its holding is nevertheless in conflict with the court of appeals' decision in this case and other similar cases because it specifically rejects the argument (adopted by the court in *HLM* and the Tenth Circuit in this case) that in order to be entitled to priority status, a benefit must be a direct wage substitute. *See In re Saco*, 711 F.2d at 449. The *Saco* court found "no merit" in this contention, finding that "[s]uch substitution can normally be assumed, unless the employer is a philanthropist." *Id.* Additionally, with the prospect of mandatory health insurance benefits becoming

2. The Tenth Circuit declined to reach the issue in this case, finding that it was not necessary to reach a decision. *See* 144 F.3d at 717 n.6.

more of a reality, the need for a clear statement on these issues is becoming even more important.

B. The Court of Appeals' Reasoning in these Cases is Inconsistent

Not only have these courts of appeal come to opposite conclusions on the application of section 507, they have done so for different reasons, disagreeing on much of the relevant rationale. A brief examination of a few of these cases illustrates the conflict in the law, and illuminates the reasons this Court needs to address this issue.

1. *The Ninth Circuit View*

The first court of appeals to address the issue presented in this case was the Ninth Circuit, in *Plaid Pantries*. In *Plaid Pantries*, the court read the plain language of section 507(a)(4)'s grant of priority to claims for "contributions" to an "employee benefit plan" to encompass insurance premiums which fund workers' compensation plans established by an employer for the benefit of its employees. 10 F.3d at 605. The *Plaid Pantries* court noted that section 507(a)(4) was specifically added to the Bankruptcy Code in order to provide a level of priority for employee benefits not previously covered, and to overrule two prior cases of the United States Supreme Court[3] which had held that "fringe benefits" were not entitled to priority status. *See* 10 F.3d at 607; *In re Saco,* 711 F.2d at 448.

In analyzing the issue, the court looked to the purpose of the entire workers' compensation system, which is to provide benefits *to employees injured at work. Plaid Pantries*, 10 F.3d at 607 (emphasis added). The court reasoned:

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3. These cases were *United States v. Embassy Restaurants, Inc.*, 359 U.S. 29 (1959), and *Joint Indus. Board v. United States*, 391 U.S. 224 (1968).

> Those benefits are generally funded by insurance, the premiums for the insurance are paid by the employers, and the costs are passed on in the form of lower wages and higher prices. Those benefits are a form of compensation offered to workers in exchange for the labor that they performed. While the insurance is often statutorily — as opposed to contractually — mandated, the workers' compensation system is nonetheless a plan of compensation available to workers, and the employers' payment of insurance premiums fund it.

Id. Because the purpose of subsection (a)(4) is to protect workers' benefit plans, the Ninth Circuit found that the best way to support that goal would be to allow the insurer to obtain its premiums through the priority. *Id.* (citing *In re Saco*, 711 F.2d at 449).

The court specifically rejected the argument that § 507(a)(4) only encompasses benefits that are a direct substitute for the wages given priority under subsection 3 of § 507,[4] noting that subsection 4 was meant to expand the priorities granted under § 507, as opposed to simply substituting them. *Id.* The court also rejected the argument that contributions must be "negotiated," stating:

> We see no reason for concluding that Congress intended to deny priority to workers' compensation benefit plans while granting the same statutory priority to other plans providing benefits to employees. Nor can we conclude that Congress

4. Section 507(a)(3) of the Bankruptcy Code provides third priority to allowed, unsecured claims of the debtor's employees or "wages, salaries, or commissions" earned within 90 days of the bankruptcy filing or the cessation of the debtor's business.

> intended to distinguish between benefit plans that are contractually promised to employees and those that are statutorily required. The purpose of the priority, to protect the solvency of benefit plans, is present in both situations.

Id.

2. *The Eighth Circuit View*

The Ninth Circuit's sound reasoning was squarely rejected by the Eighth Circuit Court of Appeals in the *HLM* case. *See* 62 F.3d 224 (8th Cir. 1995). In *HLM*, the Eighth Circuit agreed with the *Plaid Pantries* court that the language of section 507(a)(4) is unambiguous, but then went on to read it differently. The *HLM* court's decision was based, for the most part, on the fact that employers are required to maintain workers' compensation insurance by statute. Because the insurance is required by statute, the court reasoned, insurance premiums benefit the employer more than the employee, and thus are not a "benefit" which could be the object of a "benefit plan." For the same reason, that court found that payment of premiums was not "voluntary" and that a claim for unpaid insurance premiums is not a claim for a contribution, holding that the term "contribution" implies voluntariness. *Id.* at 226.

Although the *HLM* court noted an irreconcilable conflict between jurisdictions, it is important to note that the holding of *HLM* is specifically limited to claims for unpaid workers' compensation insurance premiums "under Minnesota's workers' compensation scheme. . . ." *Id.* at 227. Thus, although in the case at bar the Tenth Circuit and the BAP adopted the reasoning of the *HLM* case, its holding is actually inapplicable to these facts, because the scheme of workers' compensation under Minnesota law is critically different from the plan for

workers' compensation set forth under Oklahoma law; therefore, insurance is less of a benefit to employees in Minnesota.

In Minnesota, compensation insurance is not crucial to employees. A Minnesota employee injured on the job will always receive benefits, even if the employer is uninsured, because the workers' compensation statutory scheme in Minnesota provides for a special compensation fund for all employees in the state. *HLM*, 165 B.R. 38, 40-41 (Bankr. D. Minn.), *aff'd*, 183 B.R. 852 (D. Minn. 1994). In Oklahoma, however, workers' compensation insurance is a very important benefit, because there is no "special compensation fund." Under the Oklahoma statutory scheme, an employer is statutorily required to carry insurance, to be self-insured, to be part of a group self-insurance association or to obtain an approved workers' compensation equivalent insurance product. 12 Okla. Stat. tit. 85, §§ 61, 65 (Supp. 1997). If an employer fails to comply with the Act, it is subject to severe civil and criminal penalties, an injured employee can sue in district court, and the employer will be estopped from asserting certain defenses. *Id.* §§ 12, 63.1, 63.3 (Supp. 1997). Even so, obtaining a money judgment against an illegally uninsured employer is not necessarily beneficial to an injured employee, because there is no guarantee that the employee would be able to collect any or all of such judgment. On the other hand, if the employer's compensation insurance premiums are paid, so that the insurance remains in force, the employee may proceed to collect his money directly from the insurer. *Id.* § 12 (1991).

Because injured workers in Minnesota are taken care of regardless of whether their employer pays their workers' compensation insurance premiums, the insurance is less important, and not as much of a "benefit" to employees in Minnesota. This legal distinction changes the fundamental

nature of the insurance carrier's position as a claimant under section 507(a)(4). Nevertheless, in this case, the Tenth Circuit ignored this distinction between Oklahoma and Minnesota law, and found *HLM* persuasive. *See* 144 F.3d at 715 n.5. Similarly, other courts following the HLM decision have done so without regard for that distinction, and have applied the rule to insurers in states with workers' compensation systems similar to Oklahoma's. *See, e.g., In re Birmingham Nashville Express, Inc.*, 221 B.R. 194 (M.D. Tenn. 1998); *In re Allentown Moving & Storage, Inc.*, 214 B.R. 761 (Bankr. E.D. Pa. 1997).

3. *The Tenth Circuit View*

In this case, the Tenth Circuit noted the conflict in circuits, but agreed with the conclusion and much of the reasoning of the *HLM* court, finding that because workers' compensation insurance is statutorily mandated, it is not a bargained-for wage substitute or "fringe benefit," and that it is therefore not entitled to priority status. *Id.* at 716. It found that workers' compensation insurance it is not an employee benefit plan because it "benefits the employer at least as much, if not more, than the employee" and is not primarily for the benefit of the employee. *Id.* Although these limitations are clearly not contained in the plain language of the statute, the court gleaned these limitations from the legislative history of section 507(a)(4). *Id.*

The Bankruptcy Appellate Panel for the Tenth Circuit also agreed with much of the *HLM* court's reasoning, but took it even one step further, finding that the priority was meant to apply only to claims of employees, and not to third parties' claims. *See* 210 B.R. 838, 842 (10th Cir. B.A.P. 1997). Unlike the Tenth Circuit, the BAP did not find that the statute was ambiguous, and simply looked to the plain language of the statute. Although the plain language of section 507 includes no requirement that a contribution be "voluntary," the BAP

nevertheless found that insurance premiums are not "contributions," finding that a contribution must be voluntary, and reasoning that statutorily mandated workers' compensation insurance is not voluntary. *Id.* at 841. The BAP also found that workers' compensation insurance is not a "plan" because it is not a way in which an employer seeks to compensate an employee in ways other than wages, but rather a statutorily mandated system to spread risks of work related injuries. *Id.* at 841. It further found that insurance premiums do not arise from "services rendered" by employees as required under section 507(a)(4), but rather from the debtor's failure to pay its insurer. *Id.* Finally, the BAP found without discussion that workers' compensation insurance is not a "benefit" plan because it provides workers an alternative to recovering for work related injuries through the courts. *Id.*

Both the Tenth Circuit and the BAP found that although the Employment Retirement Security Act ("ERISA") defined the term "employee benefit plan," the ERISA definition would not be helpful. The courts completely ignored the legislative history, discussed in detail below, that indicates the ERISA definition is relevant to the interpretation of section 507(a)(4). 144 F.3d at 714; 210 B.R. at 842.

II.

BECAUSE OF THE CONFUSION IN THE LAW, THIS CASE PRESENTS THIS COURT WITH IMPORTANT ISSUES OF FEDERAL LAW; DUE TO THE GRAVITY OF THESE ISSUES AND THE FREQUENCY WITH WHICH THEY OCCUR, THEY SHOULD BE SETTLED BY THIS COURT.

The conflict in the courts of appeal, as well as the lack of controlling precedent, has created an irreconcilable division in the bankruptcy courts and federal district courts presented with

the application of this section of the Code. Not surprisingly, many of these courts have held that claims for workers' compensation insurance premiums are entitled to priority status under 507(a)(4), and many have held that they are not. *Compare In re Braniff, Inc.*, 218 B.R. 628 (Bankr. M.D. Fla. 1998); *In re Gerald T. Fenton, Inc.*, 178 B.R. 582 (Bankr. D.D.C. 1995); *Perlstein v. Rockwood Ins. Co. (In re AOV Indus., Inc.)*, 85 B.R. 183 (Bankr. D.D.C. 1988) (holding that claims for workers' compensation insurance premiums *are* entitled to priority) *with In re Allentown Moving & Storage, Inc.*, 208 B.R. 835 (Bankr. E.D. Pa. 1997); *In re the Montaldo Corp.*, 207 B.R. 112 (Bankr. M.D.N.C. 1997); *In the Matter of Arrow Carrier Corp.*, 154 B.R. 642 (Bankr. D. N.J. 1993) (holding that they are not).

This has created 4 critical questions which must be addressed before this issue can be completely resolved, and before there will be consistency in the treatment of insurers and other third-parties who help employers fund benefit plans:

A. Should the ERISA definition of "employee benefit plan" be used to interpret section 507(a)(4)?

B. Are the claims of non-employee third-parties eligible for section 507(a)(4) priority?

C. Must benefits be directly bargained-for to qualify for priority status? and

D. If third-party insurers' claims are covered, is workers' compensation insurance critically different than other types of insurance?

A. Should the ERISA definition of "employee benefit plan" be used to interpret section 507(a)(4)?

The term "employee benefit plan" is specifically defined in ERISA as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

See 29 U.S.C. §§ 1002(1), 1002(3) (1996). Under the plain language of this definition, a plan for purchasing workers' compensation insurance to provide medical or hospital care or other benefits resulting from disability incurred by virtue of a workplace injury qualifies as an "employee benefit plan." For the same reasons, a claim for the premiums which are paid, or contributed by the employer in order to fund and maintain such a plan should be entitled to priority under section 507(a)(4) of the Code.

Although the Code does not specifically refer to or incorporate the ERISA definition, many courts have found that definition useful in interpreting section 507(a)(4). In fact,

because Congress adopted ERISA prior to adopting section 507(a)(4), and because ERISA and section 507(a)(4) have similar purposes, using the ERISA definition would simplify the conflict this case presents. Where Congress "borrows" terms of art which have an accepted meaning, it presumably adopts that meaning unless it indicates otherwise. *In re Allegheny Int'l*, 138 B.R. at 173 n.5 (citing *Morissette v. United States*, 342 U.S. 246, 263 (1952)); *In re Plaid Pantries*, 137 B.R. at 407; *In re Saco*, 23 B.R. at 646; *see also United States v. Embassy Restaurants, Inc.*, 359 U.S. 29, 38 (1959) ("[o]f course, a word need not mean the same thing in different statutes, but the meaning attributed in one Act is far from irrelevant to the interpretation of another.") (Black, J., dissenting). Nothing in the language of section 507(a)(4) or its legislative history indicates the term was meant to have a distinctly different meaning in the Code.

Based on this and similar reasoning, the following courts have held that the ERISA definition of "employee benefit plan" is helpful in interpreting and applying section 507: *In re Plaid Pantries, Inc.*, 137 B.R. 405, 406 (D. Or. 1991), *aff'd on other grounds*, 10 F.3d 605 (9th Cir. 1993); *In re Allegheny Int'l, Inc.*, 138 B.R. 171, 173 (Bankr. W.D. Pa. 1992), *aff'd*, 145 B.R. 820 (W.D. Pa. 1992); *Perlstein v. Rockwood Ins. Co. (In re AOV Indus., Inc.)*, 85 B.R. 183, 186 (Bankr. D. Colo. 1988); *In re Saco Local Dev. Corp.*, 23 B.R. 644, 646 (Bankr. D. Me. 1982), *aff'd on other grounds*, 711 F.2d 441 (1st Cir. 1983).

Other courts have disagreed, finding that the ERISA definition has no relevance to the term as it might have been used in the Bankruptcy Code. or that use of that definition results in an overly broad interpretation of section 507(a)(4). *See, e.g., HLM*, 62 F.3d at 226; *Southern Star*, 144 F.3d at 714; 210 B.R. at 842; *In re the Montaldo Corp*, 207 B.R. 112, 115 (Bankr. M.D. N.C. 1997); *In re Jet Florida Systems, Inc.*, 80 B.R. 544, 547 (S.D. Fla. 1987).

In fact, legislative history supports the conclusion that Congress intended the term "employee benefit plan" to have the same meaning in section 507 that it has under ERISA. When a House Subcommittee was considering part of what became the 1979 Bankruptcy Code, the Subcommittee was specifically urged to adopt the term "employee benefit plan" as used in ERISA into the section on priorities in order to provide broad protection to all employee benefit plans. *See* Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st & 2d Sess. 2424-2425 (1975-76). The Subcommittee was urged to make the statute broad, and to delete restrictive wording which mentioned specific types of plans, on the grounds that such restrictive language would cause courts to limit the types of claims covered by the priority to only those listed. *Id.* The fact that Congress did then adopt that very term found in ERISA supports the use of the ERISA definition in interpreting section 507(a)(4). *See In re Allegheny*, 138 B.R. at 174; *In re Saco*, 23 B.R. at 646.

B. Are the claims of non-employee third-parties eligible for section 507(a)(4) priority?

A majority of courts have held that the priority of section 507(a)(4) is available to third-parties, and is not limited to claims of employees. *See, e.g., Plaid Pantries, Inc.*, 10 F.3d 605; *In re Saco*, 711 F.2d 441; *In re Lummus Indus., Inc.*, 193 B.R. 615 (Bankr. M.D. Ga. 1996); *In re Gerald T. Fenton, Inc.*, 178 B.R. 582 (Bankr. D. Colo. 1995); *In re Cardinal Indus., Inc.*, 164 B.R. 76 (Bankr. S.D. Ohio 1993); *Allegheny Int'l, Inc. v. Metropolitan Life Ins. Co.* (*In re Allegheny Int'l, Inc.*), 138 B.R. 171 (Bankr. W.D. Pa. 1992), *aff'd*, 145 B.R. 120 (W.D. Pa. 1992); *Perlstein v. Rockwood Ins. Co.* (*In re AOV Indus., Inc.*), 85 B.R. 193 (Bankr. D. Colo. 1988); *In re Jet Florida Sys., Inc.*, 80 B.R. 544 (S.D. Fla. 1987); *In re Robinson*

Truck Line, Inc., 47 B.R. 631 (Bankr. N.D. Miss. 1985); and *see In re Cirrus Corp.*, 196 B.R. 76 (S.D. Tex. 1996) (granting priority to claim of insurer but not specifying statutory authority). Even the Eighth Circuit decision in *HLM Corp.*, 62 F.3d 224 (8th Cir. 1995), does not disagree with this point.

The decisions in these cases are based, for the most part, on the realization that the best way to provide employees with the benefit of health, life or workers' compensation insurance is to ensure that the premiums entitling them to those benefits continue to be paid, along with other costs and expenses borne by the third-party in providing the benefits.

Some courts, however, have found that the intent of section 507(a)(4) is to provide protection only to claims of employees, regardless of how much employees would be benefitted by allowing third-parties' claims priority status. *See, e.g., In re Montaldo*, 207 B.R. at 117; *In re AER-Aerotron, Inc.*, 182 B.R. 725, 727 (Bankr. E.D. N.C. 1995).

C. Must benefits be directly bargained-for to qualify for priority status?

By reading a "bargained-for" restriction into the statute based on their reading of legislative history, the courts are using legislative history to reach a result not mandated by the plain language of the statute. Also, although the insurance may indirectly benefit the employer by assisting the employer in remaining in compliance with state law, it is clear that the main purpose of the statutory mandate is to protect employees, not employers. In practice, any benefit provided to an employee indirectly benefits the employer, either by attracting a better class of employees or by ensuring compliance with a collective bargaining agreement.

By finding that a contribution to an employee benefit plan must be a bargained-for wage substitute in order to qualify for priority status, courts have ignored the plain language of the statute and improperly added an additional limitation to the statutory priority. *See In re Edgar B., Inc.*, 200 B.R. 119, 122 (M.D. N.C. 1996) (bankruptcy court cannot impose additional limitations on statutory priority established for employee benefit plans). Because the plain language of section 507(a)(4) applies to all types of contributions to employee benefit plans, and because the statute contains no language restricting the priority either to wage substitutes or negotiated benefits, this Court should correct the decisions finding that such limitations are somehow implied.

D. If third-party insurers' claims are covered, is workers' compensation insurance critically different than other types of insurance?

Most of the courts finding that claims for workers' compensation insurance premiums are not entitled to priority status — including the Tenth Circuit in this case — have followed the Eighth Circuit's *HLM* decision and held that workers' compensation insurance is fundamentally different than other insurance because it is statutorily rather than contractually mandated. *See, e.g., Southern Star*, 144 F.3d at 716; *In re Allentown Moving & Storage, Inc.*, 208 B.R. 835 (Bankr. E.D. Pa. 1997); *In re the Montaldo Corp.*, 207 B.R. 112 (Bankr. M.D. N.C. 1997); *In the Matter of Arrow Carrier Corp.*, 154 B.R. 642 (Bankr. D. N.J. 1993). These courts generally read the legislative history of section 507(a)(4) to require that "employee benefits" be direct, bargained-for wage substitutes and reason that statutorily mandated insurance coverage is not bargained-for. They also find that because the insurance may benefit the employer by allowing it to comply with applicable laws, it is not a "benefit" to the employee. *See, e.g., Southern Star*, 144 F.3d at 716.

Other courts do not read the plain language of section 507(a)(4) to require that employee benefits be directly bargained-for and find that regardless of all of the reasons an employer might procure workers' compensation insurance, it nevertheless benefits the employee along with the employer. *See Plaid Pantries*, 10 F.3d at 607. These courts also point out that if an employer is required to purchase insurance for its employees, it is highly likely that the cost of that insurance will be passed on to those employees in the form of lower wages. In that sense, it is a wage substitute. *See Id.*

In almost every state, employers are required by law to provide employees with workers' compensation benefits. Despite this universal recognition of the importance of these benefits, courts are reading limiting terms into section 507 to make workers' compensation benefits an exception to the general rule that employee benefits will be given priority. This approach defies logic.

If the statute is read to contain a requirement that covered benefits be "bargained-for," courts attempting to apply that concept will certainly need guidance in this area. The concept raises many questions for which there is no existing precedent. As an example, courts will have to determine whether "bargained-for" fringe benefits are only those covered by a collective bargaining agreement. If not, how will a court determine whether a particular benefit was actually "bargained-for"? Should courts take testimony from the employer regarding whether employees would be paid more wages if they did not receive insurance benefits, or should it evaluate the situation of individual employees?

It is also apparent that health benefits may become mandatory in many jurisdictions. If those benefits are mandatory, would there then be any difference between health insurance and workers' compensation insurance for purposes of section 507(a)(4)?

It is clear that there are many areas of conflict for which there is no clear precedent. It is also evident that without clarification from this Court, the issue will remain unresolved, with resulting confusion for judges, trustees, employers and employees across the country.

CONCLUSION

Congress enacted the federal statute in question to overrule two prior decisions of this Court, which held that fringe benefits were not "wages," as that term is used in section 507(a)(3) of the Bankruptcy Code. Congress has indicated that it enacted the legislation so that all employer-provided benefits enjoyed by employees would be included within the terms of the section 507 priorities, regardless of whether they were in the form of wages. The courts which have interpreted and applied this statute have reached an irreconcilable conflict, and there is accordingly no uniformity in how the statute is applied, or how similarly positioned creditors and employees are treated. This Court has not previously addressed this issue, but should, in order to provide uniformity in the application of federal law. This conflict will not be resolved without action by this Court, and the issue will continue to arise and have far-reaching consequences until the conflict is resolved.

Wherefore, Petitioner the State Insurance Fund respectfully requests that its Petition for Certiorari be granted and that the opinion of the Tenth Circuit Court of Appeals in this case be reviewed by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED MAY 21, 1998

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 97-7102
BAP No. EO-96-034
E.D. Oklahoma
(D.C. No. 94-71621)

In re: SOUTHERN STAR FOODS, INC.,

Debtor,

STATE INSURANCE FUND,

Appellant,

v.

SOUTHERN STAR FOODS, INC.; KENNETH G.M. MATHER, Trustee,

Appellees.

JUDGMENT

Filed May 21, 1998

Before **BRORBY, BARRETT,** and **BRISCOE,** Circuit Judges.

This case originated from the United States Bankruptcy Appellate Panel for the Tenth Judicial Circuit and was submitted on the briefs on the direction of the court.

Appendix A

The judgment of that court is affirmed.

Entered for the Court
PATRICK FISHER, Clerk

by: s/ [illegible]
Deputy Clerk

Appendix A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 97-7102

In re:

SOUTHERN STAR FOODS, INC.,

Debtor,

STATE INSURANCE FUND,

Appellant,

v.

SOUTHERN STAR FOODS, INC.; KENNETH G.M. MATHER, Trustee,

Appellee.

APPEAL FROM THE UNITED STATES
BANKRUPTCY APPELLATE PANEL
BAP No. EO-96-034
E.D. Oklahoma
(D.C. No. 94-71621)

* * *

Appendix A

Before **BRORBY**, **BARRETT**, and **BRISCOE**, Circuit Judges.

BRISCOE, Circuit Judge.

Appellant, the State Insurance Fund (Fund), appeals from the Bankruptcy Appellate Panel (BAP) decision that its claim for unpaid workers' compensation insurance premiums is not entitled to priority status under 11 U.S.C. § 507(a)(4) in the Chapter 7 bankruptcy of the debtor, Southern Star Foods.[1] *See State Ins. Fund v. Mather (In re Southern Star Foods, Inc.)*, 210 B.R. 838 (10th Cir. B.A.P. 1997). This appeal presents a purely legal question, which we review de novo. *See Broitman v. Kirkland (In re Kirkland)*, 86 F.3d 172, 174 (10th Cir. 1996). We affirm.

Southern Star contracted with the Fund to provide workers' compensation insurance coverage. On November 17, 1994, the insurance was canceled. At the time the coverage was canceled, Southern Star owed the Fund hundreds of thousands of dollars in unpaid premiums. When an involuntary petition in bankruptcy was filed against Southern Star on December 23, 1994, the Fund claimed priority status for their unsecured creditors' claim under § 507(a)(4), in the amount of $186,898.27.[2] The trustee objected to the Fund's claim of priority status, and the Bankruptcy Court sustained the objection, finding that § 507(a)(4) did not give priority status to a claim for unpaid workers' compensation premiums. The

1. After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

2. The parties have stipulated that this is the amount of premiums incurred within 180 days of the petition date. *See* 11 U.S.C. § 507(a)(4) (providing for priority of certain claims arising from services rendered within 180 days before the filing of the petition).

Fund appealed the decision to the BAP, which affirmed the denial of priority status under § 507(a)(4) in a very thorough and well-reasoned opinion.

The relevant portion of § 507(a)(4) provides:

> (a) The following expenses and claims have priority in the following order;
>
> (4) Fourth, allowed unsecured claims for contributions to an employee benefit plan —
>
> (A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only
>
> (B) for each such plan, to the extent of —
>
> (I) the number of employees covered by each such plan multiplied by $4,000; less
>
> (ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.[3]

The position of the parties in this appeal is simple and straightforward. The Fund argues that the unpaid workers' compensation insurance premiums owed to it by Southern Star are contributions to an employee benefit plan within the meaning of

---

3. Paragraph (3) provides priority for unpaid wages.

§ 507(a)(4), and are, therefore, entitled to priority status. The trustee argues that they are not.

We begin our analysis with the premise that the overriding objective in bankruptcy cases is equal distribution of the debtor's limited resources among its creditors. *See Isaac v. Temex Energy, Inc. (In re Amarex, Inc.)*, 853 F.2d 1526, 1530 (10th Cir. 1988). To that end, statutory priorities must be narrowly construed. *See id.*

The Bankruptcy Code does not define "contributions to an employee benefit plan." The Fund urges us to look to the Employee Retirement Income Security Act of 1974 (ERISA) and apply the definition of "employee benefit plan" set forth in that statute to § 507(a)(4). We decline to read the ERISA definition of "employee benefit plan" into the Bankruptcy Code. We agree with the Eighth Circuit that " '[t]he ERISA definition and associated court guidelines were designed to effectuate the purpose of ERISA, not the Bankruptcy Code.' " *Employers Ins. of Wausau, Inc. v. Ramette (In re HLM Corp.)*, 62 F.3d 224, 226 (8th Cir. 1995) (quoting *Employers Ins. of Wausau, Inc. v. Ramette (In re HLM Corp.)*, 183 B.R. 852, 855 (D. Minn. 1994)); *accord In re The Montaldo Corp.*, 207 B.R. 112, 115 (Bankr. M.D.N.C. 1997); *Official Labor Creditors Comm. v. Jet Florida Sys., Inc. (In re Jet Florida Sys., Inc.)*, 80 B.R. 544, 547 (S.D. Fla. 1987); *see also United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 116 S.Ct. 2106, 2111-13 (1996) (declining to apply usage of term in Internal Revenue Code to term in Bankruptcy Code, absent some Congressional indication). Further, broadening the Bankruptcy Code by incorporating the ERISA definition into the § 507(a)(4) priority determination would be contrary to the tenet that priorities are to be narrowly construed. *See In re Amarex, Inc.*, 853 F.2d at 1530.

Two other circuit courts have addressed the issue of whether workers' compensation premiums are contributions to an employee benefit plan within the meaning of § 507(a)(4) so as to be entitled to priority status, and they reached opposite conclusions. *Compare Employers Ins. of Wausau, Inc. v. Ramette (In re HLM Corp.)*, 62 F.3d 224, 227 (8th Cir. 1995) (holding that unpaid workers' compensation premiums were not contributions to an employee benefit plan entitled to priority status), *aff'g* 183 B.R. 852 (D. Minn. 1994), *aff'g* 165 B.R. 38 (Bankr. D. Minn. 1994), *with Employers Ins. of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605, 607 (9th Cir. 1993) (holding that unpaid workers' compensation premiums were entitled to priority status under § 507(a)(4)). Other courts finding that claims for workers' compensation premiums were not entitled to priority under § 507(a)(4) include *In re Southern Star Foods, Inc.*, 210 B.R. at 844, *aff'g* 201 B.R. 291 (Bankr. E.D. Okla. 1996); and *In re Allentown Moving & Storage, Inc.*, 208 B.R. 835, 837 (Bankr. E.D. Pa. 1997), *aff'd* 214 B.R. 761 (E.D. Pa. 1997). Other cases finding that claims for workers' compensation premiums were entitled to priority include *In re Braniff, Inc.*, 218 B.R. 628, 635 (Bankr. M.D. Fla. 1998) (deciding issue without examining legislative history, and adopting the position in *In re Gerald T. Fenton, Inc.* with no discussion of ERISA); *In re Gerald T. Fenton, Inc.*, 178 B.R. 582, 587-88, 590 (Bankr. D. D.C. 1995) (applying ERISA definition of "employee benefit plan"); and *Perlstein v. Rockwood Ins. Co. (In re AOV Indus., Inc.)*, 85 B.R. 183, 186, 189 (Bankr. D. D.C. 1988) (same).[4]

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4. Also helpful to our analysis, although not directly on point, are the decisions that have reached the question of priority with regard to premiums for types of insurance other than workers' compensation. *Compare In re The Montaldo Corp.*, 207 B.R. 112, 115-16 (Bankr. M.D.N.C. 1997) (holding no priority for health insurance premiums for past coverage

(Cont'd)

Before we can answer this question of first impression in this Circuit, we must first determine whether the meaning of the statute is evident from its plain language, or if the phrase is ambiguous. The split in the circuits is, in itself, evidence of the ambiguity of the phrase "contributions to an employee benefit plan;" its meaning is not evident based on the plain language of the statute. Because the phrase is ambiguous, we turn to the legislative history of the statute to aid our analysis. *See United States v. Simmonds*, 111 F.3d 737, 742 (10th Cir. 1997).

Like the BAP, we agree with the Eighth Circuit that the legislative history clarifies that § 507(a)(4) grants priority for "fringe benefits" accepted in lieu of wages. *In re HLM, Corp.*, 62 F.3d at 225-26.[5] In enacting § 507(a)(4), Congress stated:

(Cont'd)
because payment for past coverage benefits only third-party insurer, not employees); *In re AER-Aerotron, Inc.*, 182 B.R. 725, 726-27 (Bankr. E.D.N.C. 1995) (finding no priority for group health/life insurance premiums because legislative history and plain meaning of statute indicate priority is meant for employees, not third parties),*with Official Creditors' Comm. of Lummus Indus., Inc. v. Blue Cross & Blue Shield of Georgia, Inc. (In re Lummus Indus., Inc.)*, 193 B.R. 615, 617-18 (Bankr. M.D. Ga. 1996) (finding unreimbursed health insurance claims under self-funded insurance plan entitled to priority where self-insurance plan was part of the compensation for debtor's employees); *Official Labor Creditors Comm. v. Jet Florida Sys., Inc. (In re Jet Florida Sys., Inc.)*, 80 B.R. 544, 547-48 (S.D. Fla. 1987) (finding employee claims for unreimbursed insurance claims under self-insurance plan entitled to priority).

5. The fact that the holding of *In re HLM Corp.* is based on Minnesota's workers' compensation scheme does not negate its persuasive authority. Only a small portion of the court's reasoning is based on the unique aspects of that state's statutory scheme; the bulk of the analysis is based on general workers' compensation characteristics. The factual distinctions between Oklahoma's and Minnesota's statutory schemes do not vitiate the applicability of *In re HLM Corp.* to this case.

Appendix A

> The Supreme Court has held that the wage priority does not extend to fringe benefits, such as pension fund or health insurance contributions. When the wage priority was last amended in 1926, perhaps the intent of Congress was not to extend it in that fashion, because fringe benefits were little heard of at the time. Now, however, to ignore the reality of collective bargaining that often trades wage dollars for fringe benefits does a severe disservice to those working for a failing enterprise.
>
> In recognition of changes since 1926, the bill . . . establishes a new category, a fourth priority immediately following the wage priority, for contributions and payments to employee benefit plans. This will include health insurance programs, life insurance plans, pension funds, and all other forms of employee compensation that is not in the form of wages.

H.R. Rep. No. 95-595, at 187 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6148 (footnotes omitted). Specifically addressing § 507(a)(4), the legislative history provides:

> Paragraph (4) overrules *United States v. Embassy Restaurant*, 359 U.S. 29 (195[9]), which held that fringe benefits were not entitled to wage priority status. The bill recognizes the realities of labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted. The priority granted is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, and others, arising from services rendered after the earlier of one year before the

> bankruptcy case and the date of cessation of the debtor's business.

Id. at 357, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313 (footnotes omitted); *see also* S. Rep. No. 95-989, at 69 (1978) *reprinted in* 1978 U.S.C.C.A.N. 5787, 5855.

The legislative history makes it clear that Congress enacted § 507(a)(4) to benefit employees. It recognized the reality that employees often bargain for fringe benefits in lieu of higher wages. The two Supreme Court cases that gave rise to the enactment of § 507(a)(4) both involved plans organized to provide benefits for employees pursuant to collective bargaining agreements. *See Embassy Restaurant*, 359 U.S. at 29-30 (contributions owed by employer to welfare fund); *Joint Indus. Bd. of Elec. Indus. v. United States*, 391 U.S. 224, 225 (1968) (contributions owed by employer to employees' annuity plan). In those cases, the Court denied priority status under the statutory priority for wages in effect at the time, for contributions to plans that provided fringe benefits for employees. Section 507(a)(4) was enacted to change that result.

Workers' compensation coverage, on the other hand, is not a fringe benefit that an employee can bargain for, either explicitly or impliedly, in lieu of higher wages. It is not a fringe benefit or wage substitute, as contemplated by Congress in enacting § 507(a)(4). In addition, the legislative history indicates that workers' compensation is not an employee benefit plan because the coverage benefits the employer at least as much, if not more, than the employee. As both the Bankruptcy Court and the BAP recognized, "since workers' compensation premiums are required to meet an obligation imposed by the state, they were primarily for Southern Star's benefit, not its employees." *In re Southern Star Foods*, 210 B.R. at 843. To that end,

> [t]he purpose of the Oklahoma workers' compensation benefit scheme simply cannot be interpreted as a "fringe benefit" supplementing wages. In fact, the scheme was a compromise between workers and employers in which the workers gave up the right to sue for damages for work-related injuries, and the employers gave up certain defenses, such as the "fellow servant rule." *Carroll [v. District Court]*, 579 P.2d [828,] 830 [(Okla. 1978)]. The Oklahoma Supreme Court observed, "[e]very common-law right of the workman has been abrogated, and another right substituted, not governed by common-law rules. . . . The injured workman can no longer use common-law rules . . . to extract compensation for injuries sustained by him." *Brooks v. A.A. Davis & Co.*, 254 P. 66, 70 (1926).

Id. at 844.

In reaching our holding today, we are mindful of the Ninth Circuit decision in *Plaid Pantries*, with which we respectfully disagree. That court examined the legislative history, but interpreted it differently in holding that premiums owed for workers' compensation coverage were entitled to priority under § 507(a)(4). *See Plaid Pantries*, 10 F.3d at 607. In deciding that the benefit need not be a wage substitute, that court construed the statutory priority broadly, something we must guard against. The court in *Plaid Pantries* cites *In re Saco Local Dev. Corp.*, 711 F.2d 441 (1st Cir. 1983) in support of its holding. We note that *In re Saco* is not inconsistent with our holding in this case. That court considered the question of whether § 507(a)(4) was intended to afford priority only for contributions made to benefit plans that resulted from a formal collective bargaining process.

See id. at 448-49. In holding that the legislative history did not limit the fringe benefit priority to those benefits resulting from formal collective bargaining, the court noted that the record contained evidence that the group life/health/disability plan resulted in a de facto bargain for which employees accepted lower wages than other firms paid. *See id. In re Saco* does not conflict with our holding in this case.[6]

We hold that premiums for workers' compensation insurance are not contributions to an employee benefit plan as contemplated by Congress in the enactment of § 507(a)(4). Therefore, a claim for unpaid workers' compensation premiums is not entitled to priority status under that statute. AFFIRMED.

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6. Because it is not necessary to our decision in this case, we do not reach the question of whether Congress intended that third parties, such as insurance companies, may claim the priority afforded in § 507(a)(4). *Compare In re Saco*, 711 F.2d at 449 (holding that "[t]o allow the insurer to obtain its premiums through the priority would seem the surest way to provide the employees with the policy benefits to which they are entitled."), *with In re Montaldo*, 207 B.R. at 117 (finding that to allow insurance company priority would be contrary to § 507(d)); In *re AER-Aerotron*, 182 B.R. at 727 (finding that § 507(a)(4) does not provide priority to third parties).

APPENDIX B — OPINION OF THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT FILED JULY 28, 1997

PUBLISH

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT

BAP No. EO-96-034

Bankr. No. 94-71621
Chapter 7

IN RE SOUTHERN STAR FOODS, INC.,

Debtor.

THE STATE INSURANCE FUND,

Appellant,

v.

KENNETH G.M. MATHER, Trustee; and SOUTHERN STAR FOODS, INC.,

Appellees.

Appeal from the United States Bankruptcy Court
for the Eastern District of Oklahoma

* * *

Appendix B

OPINION

Before McFEELEY, Chief Judge, PEARSON, and BOULDEN, Bankruptcy Judges.

McFEELEY, Chief Judge.

The State Insurance Fund (the "Fund") appeals from a final order of the United States Bankruptcy Court for the Eastern District of Oklahoma denying the Fund priority status under 11 U.S.C. § 507(a)(4).[1] *In re Southern Star Foods, Inc.*, 201 B.R. 291 (Bankr. E.D. Okla. 1996). This Court has jurisdiction under 28 U.S.C. § 158(c), and reviews the statutory interpretation of the Bankruptcy Court de novo. Tulsa *Energy, Inc. v. KPL Prod. Co. (In re Tulsa Energy,* Inc.), 111 F.3d 88, 89 (10th Cir. 1997). Because this Court agrees with the Bankruptcy Court that unpaid workers' compensation premiums are not entitled to priority status pursuant to § 507(a)(4), we affirm.

BACKGROUND

In the Bankruptcy Court the parties stipulated to the following facts: Southern Star Foods, Inc. ("Southern Star") contracted with the Fund for workers' compensation insurance coverage from February 1, 1994, to November 17, 1994, when the Fund canceled coverage for nonpayment of premiums. Southern Star did not pay the premiums due to the Fund from May 1, 1994, to November 17, 1994, in the amount of $230,849. 00.

On December 23, 1994, several creditors filed an involuntary Chapter 7 petition against Southern Star. On January 11, 1995,

1. Future references are to title 11 of the United States Code unless otherwise noted.

the Court entered an order for relief and on January 23, 1995, appointed Kenneth G.M. Mather as trustee (the "Trustee") of Southern Star's bankruptcy estate.

On March 17, 1995, the Fund filed its proof of claim asserting priority status under §§ 507(a)(3) and (a)(4).[2] In response to the

2. Sections 507(a)(3) and (a)(4) read as follows:

> (a) The following expenses and claims have priority in the following order:
>
> . . .
>
> (3) Third, allowed unsecured claims, but only to the extent of $4,000 for each individual or corporation, as the case may be, earned within 90 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for —
>
> > (A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; . . .
>
> (4) Fourth, allowed unsecured claims for contributions to an employee benefit plan —
>
> > (A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only
> >
> > (B) for each such plan, to the extent of —
> >
> > > (i) the number of employees covered by each such plan multiplied by $4,000; less
> >
> > > (ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

Trustee's objection, the Fund conceded the inapplicability of § 507(a)(3) but pursued its claim for priority under § 507(a)(4). Southern Star did not cease operations before the involuntary bankruptcy filing. Under § 507(a)(4) any priority claim of the Fund had to be incurred within 180 days before the involuntary petition was filed. The Fund amended its priority claim to $186,898.27, consisting of unpaid premiums incurred during this period. The Fund conceded that the remaining amount of their claim, $43,950.73 incurred before the 180-day period, should be allowed only as a general unsecured claim.

DISCUSSION

Section 507(a)(4) gives fourth priority status to "allowed unsecured claims for contributions to an employee benefit plan . . . arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first."

The Fund argues that unpaid workers' compensation insurance premiums should be granted priority status under the plain meaning of the statutory phrase, "contributions to an employee benefit plan" as held by *Employers Ins. v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir. 1993). The Trustee argues that these unpaid premiums should not be granted priority status relying on the statute's legislative history and citing *Employers Ins. v. Ramette (In re HLM Corp.)*, 62 F.3d 224 (8th Cir. 1995).

Priority status is not favored because the overriding policy in bankruptcy is equal treatment of creditors. *Jarboe v. SBA (In re Hancock)*, 137 B.R. 835, 837-38 (Bankr. N.D. Okla. 1992), *cited in Southern Star*, 201 B.R. at 293; *see also SBA v. Preferred Door Co., Inc. (In re Preferred Door Co., Inc.)*, 990 F.2d 547,

550-51 (10th Cir. 1993) (Bankruptcy Court's equitable power does not extend to altering Bankruptcy Code's "comprehensive scheme of priorities."). Therefore, statutory priorities should be construed narrowly. *Isaac vs. Temex Energy, Inc. (In re Amarex, Inc.)*, 853 F.2d 1526, 1530 (10th Cir. 1988). We agree with the Bankruptcy Court that in cases such as this one in which the debtor's assets are inadequate to satisfy all creditor's claims, priority status should be awarded only where "it is so strongly deserved as to override the claims of all other creditors to equal treatment." *Southern Star*, 201 B.R. at 293; *see Employers Ins. v. Ramette (In re HLM Corp.)*, 183 B.R. 852, 856 (D. Minn. 1994), *aff'd*, 62 F.3d 224 (8th Cir. 1995); *cf. United States v. Dumler (In re Cassidy)*, 983 F.2d 161, 164 (10th Cir. 1992) (discussing priorities under § 507(a)(7) and recognizing need to balance granting of priorities with "punishing innocent creditors of a bankrupt"). We are especially mindful of this policy in examining this issue of first impression in the Tenth Circuit.

We begin with the statutory language itself. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). However, the Bankruptcy Code does not define "contributions to an employee benefit plan." In analyzing the language of the statute, we look to the plain meaning of each term.

First, § 507(a)(4) covers "contributions" to an employee benefit plan. Here the Fund contracted with Southern Star to provide it insurance upon the payment of premiums. This insurance contract was not a "contribution" to an employee benefit plan. *In re AER-Aerotron, Inc.*, 182 B.R. 725, 727 (Bankr. E.D.N.C. 1995). Similarly, premiums arising from the issuance of a policy of insurance are not generally referred to as "contributions." *In re The Montaldo Corp.*, 207 B.R. 112, 114 (Bankr. M.D.N.C. 1997). A "contribution" implies some sort of

voluntary act. Typically, fringe benefits such as health, life and disability insurance are voluntarily given to employees. The payment of workers' compensation insurance premiums is not "voluntary;" it is mandated by statute. *In re HLM Corp.*, 165 B.R. 38, 40 (Bankr. D. Minn. 1994), *aff'd*, 183 B.R. 852, 856 (D. Minn. 1994), *aff'd*, 62 F.3d 224 (8th Cir. 1995). *See also In re Allentown Moving & Storage, Inc.*, 208 B.R. 835, 837 (Bankr. E.D. Pa. 1997) ("[S]ince workers' compensation benefits are a statutory requirement and not obtained through collective bargaining, they cannot be considered a 'contribution' to an employee's 'benefit plan.' Workers' compensation renders a benefit to both employer and employee.").

Second, in the context of § 507(a)(4), a "plan" is the manner in which an employer seeks to compensate an employee in ways other than wages. Workers' compensation insurance is not a "plan," but is a statutorily mandated system to spread risks of work-related injuries. *Id.;* Okla. Stat. Ann. tit. 85, §§ 1 et seq. (West 1997).

Third, insurance premiums do not arise from "services rendered" by employees as required under § 507(a)(4). The rendering of services by employees results in obligations to them, not to the insurer. *Montaldo*, 207 B.R. at 114. The claim for unpaid premiums does not arise from "services rendered" but from Southern Star's failure to pay its insurer. This makes it indistinguishable from a typical unsecured claim. *AER Aerotron, Inc.*, 182 B.R. at 727; *HLM*, 165 B.R. at 41.

As for whether workers' compensation insurance is a "benefit" plan, it is not. Instead, it provides workers an alternative to recovery for work related injuries through the courts. *Carroll v. District Court*, 579 P.2d 828, 830 (Okla. 1978). Allowing priority

status for workers' compensation insurance premiums would shift the recipient of priority status from the debtor's employees to the insurance carrier, which is not what Congress intended in § 507(a)(4).

> The § 507(a)(4) priority would apply to contributions to an employee benefit plan that are made by both employees and by employers. The statute does not, however, provide a priority to third parties. Furthermore, even if a third party were to be subrogated to an employee's claim under § 507(a)(4), that claim would be denied priority pursuant to § 507(d).

AER-Aerotron, 182 B.R. at 727. The reference in § 507(a)(4) to "services rendered" makes clear that Congress intended a debtor's employees, not third party workers' compensation funds or insurance carriers, to be the recipients of fourth priority status. *Montaldo*, 207 B.R. at 114 ("The rendering of services by employees results in obligations to the employees and not to an insurer."). Southern Star's employees do not have a claim against Southern Star for the unpaid premiums. Allowing the Fund to have priority under § 507(a)(4), a priority intended to benefit employees, is tantamount to subrogating the Fund to the priority of the employees, which is impermissible under § 507(d).[3] *Montaldo*, 207 B.R. at 117.

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3. Section 507(d) states:

> An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection . . . (a)(4) . . . of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

Significantly, the statutory cap on the priority described in § 507(a)(4)(B) refers to the wage priority in (a)(3) as a part of the cap's calculation. If insurance premium amounts were intended to be similarly capped, it would not be tied to the amount that employees may collect under the wage priority. *AER-Aerotron,* 182 B.R. at 727.

The Fund urges this Court to apply to the Bankruptcy Code the definition of employee benefit plan from the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq.[4] Some of the cases granting priority status to

4. ERISA defines "employee benefit plan" as follows:

> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs. or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).
>
> (2) The terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program —

(Cont'd)

insurance premiums have done so by incorporating the ERISA definition. *Metropolitan Life Ins. Co. v. Allegheny Int'l, Inc. (In re Allegheny Intl, Inc.)*, 138 B.R. 171 (Bankr. W.D. Pa. 1992), *aff'd*, 145 B.R. 820 (W.D. Pa. 1992); In re *Plaid Pantries, Inc.*, 137 B.R. 405, 407 (D. Or. 1991), *aff'd on other grounds, Employers Ins. v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir. 1993); *Perlstein v. Rockwood Ins. Co. (In re AOV Indus., Inc.)*, 85 B.R. 183 (Bankr. D.D.C. 1988); *In re Saco Local Dev. Corp.*, 23 B.R. 644 (Bankr. D. Me. 1982), *aff'd*, 711 F.2d 441 (1st Cir. 1983). This Court, however, declines to take this approach in the instant case because it is contrary to the rule that priorities should be given a narrow, strict construction. *Montaldo*, 207 B.R. at 115. And ERISA begins its definition section by stating that the terms are "[f]or purposes of this subchapter," indicating that the reach of the definitions is only as far as the ERISA statute. 29 U.S.C. § 1002. Even though the Bankruptcy Code does not define "contributions to an employee benefit plan" it does not follow that the ERISA definition should be incorporated by this Court. This is a job for Congress. *Montaldo*, 207 B.R. at 115 (citing *HLM*, 183 B.R. at 855); *Official Labor Creditors Commn. v. Jet Florida Sys., Inc. (In re Jet Florida Sys., Inc.)*, 80 B.R. 544, 547 (S.D. Fla. 1987); *see also United States v. Reorganized CF & I*

(Cont'd)

(A) provides retirement income to employees, or

(B) results in a deferral of income by employees. . . .

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan. ERISA, Pub. L. No. 93-406, § 3(1), (2). (3). 88 Stat. 829, 833 (codified as amended at 29 U.S.C. § 1002(1), (2), (3)).

Fabricators, 116 S.Ct. 2106, 2112 (1996) (declining to presume that certain terms in Internal Revenue Code were used in a similar manner in Bankruptcy Code without statutory indication).

Significantly, ERISA does not provide the help that the Fund wants because 29 U.S.C. § 1003(b)(3) specifically excludes from ERISA coverage a "plan [that] is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws[.]" *See Combined Management, Inc. v. Superintendent of Bureau of Ins.,* 22 F.3d 1, 4 (1st Cir.), *cert. denied,* 513 U.S. 943 (1994) (stating that Congress explicitly exempted state workers' compensation schemes from ERISA's purview). Moreover, " '[t]he ERISA definition and associated court guidelines were designed to effectuate the purpose of ERISA, not the Bankruptcy Code.' " *HLM,* 62 F.3d at 226 (quoting *HLM,* 183 B.R. at 855); *see also* 29 U.S.C. § 1001(b) (stating that overall policy of ERISA is to protect the interests of participants in employee benefit plans and their beneficiaries).

The case law yields conflicting opinions as to how broadly to interpret the meaning of "contributions to an employee benefit plan." *See Montaldo,* 207 B.R. at 114 (citing cases illustrating split in authority); *see also HLM,* 62 F.3d at 227 (workers' compensation insurance premiums not entitled to priority); *Plaid Pantries,* 10 F.3d at 607 (workers' compensation premiums entitled to priority). Therefore, the Bankruptcy Court was correct in concluding that this undefined term of art is ambiguous, and we may look to the legislative history of the statute to determine its purpose and shed light on the meaning of the phrase at issue. *O'Connor v. United States Dep't of Energy,* 942 F.2d 771, 773 (10th Cir. 1991); *Roberts v. United States (In re Roberts),* 906 F.2d 1440, 1442 (10th Cir. 1990).

Appendix B

The legislative history states as follows:

> Paragraph (4) overrules *United States v. Embassy Restaurant*, 359 U.S. 29 (1958), which held that fringe benefits were not entitled to wage priority status. The bill recognizes the realities of labor contract negotiations, under which wage demands are often reduced if adequate fringe benefits are substituted. The priority granted is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, and others, arising from services rendered after the earlier of one year before the bankruptcy case and the date of cessation of the debtor's business.

H.R. Rep. No. 95-595, at 357 (1977), *reprinted* in 1978 U.S.C.C.A.N. 5963, 6313 (footnote omitted); *see also* Sen. Rep. No. 95-989, at 69 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5855.

We agree with the Eighth Circuit that, "[t]he legislative history makes it clear that § 507(a)(4) covers those types of benefits that typically are bargained for in the employer-employee setting whether as part of a collective bargaining arrangement or otherwise." *HLM*, 62 F.3d at 226 (citing *HLM*, 165 B.R. at 41). The Bankruptcy Court in *Southern Star* concluded, and we agree, that § 507(a)(4) grants priority status to claims for contributions to employee benefit plans that are in the nature of bargained — for wage substitutes, which are truly "fringe benefits." *Southern Star*, 201 B.R. at 294.

This reasoning led the Bankruptcy Court to further conclude that since workers' compensation premiums are required to meet

an obligation imposed by the state, they were primarily for Southern Star's benefit, not its employees. This conclusion is in line with the Eighth Circuit's rationale when it stated

> "premiums for workers' compensation insurance are not 'contributions to an employee benefit plan,' which an employee may bargain for in lieu of higher wages, instead, . . . workers' compensation insurance is a system mandated by statute. Employers cannot offer (and employees cannot accept) higher wages as a substitute for workers' compensation benefits."

HLM, 62 F.3d at 226 (citing *HLM,* 165 B.R. at 40).

The purpose of the Oklahoma workers' compensation benefit scheme simply cannot be interpreted as a "fringe benefit" supplementing wages. In fact, the scheme was a compromise between workers and employers in which the workers gave up the right to sue for damages for work-related injuries, and the employers gave up certain defenses, such as the "fellow servant rule." *Carroll,* 579 P.2d at 830. The Oklahoma Supreme Court observed, [e]very common-law right of the workman has been abrogated, and another right substituted, not governed by common-law rules. . . . The injured workman can no longer use common-law rules . . . to extract compensation for injuries sustained by him." *Brooks v. A.A. Davis & Co.,* 124 Okla. 140, 254 P. 66, 70 (1926).

After considering the nature of workers' compensation insurance and the meaning of the terms used in § 507(a)(4), this Court holds that the priority was intended to be narrowly construed and applied to "fringe benefits" in lieu of wages. Accordingly, § 507(a)(4) was not intended to apply to unpaid

workers' compensation premiums such as those the Fund claims in this case.

The order of the Bankruptcy Court is hereby AFFIRMED.

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF OKLAHOMA GRANTING TRUSTEE'S OBJECTION TO PRIORITY STATUS OF CLAIM NO. 8 OF STATE INSURANCE FUND FILED OCTOBER 10, 1996

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 94-71621

Chapter 7

IN RE:

SOUTHERN STAR FOODS, INC.,

Debtor.

ORDER GRANTING TRUSTEE'S OBJECTION TO PRIORITY STATUS OF CLAIM NO. 8 OF STATE INSURANCE FUND

This contested matter was submitted for decision upon stipulations and briefs. Upon consideration thereof, and of the record herein, this Court, pursuant to F.R.B.P. 7052 and 9014, now finds, concludes, and orders as follows.

FINDINGS OF FACT

The parties stipulate, and the Court finds, as follows.

Southern Star Foods, Inc. ("Southern Star") contracted with the State Insurance Fund ("the Fund") for workers' compensation

insurance coverage for the period between February 1, 1994 and November 17, 1994. Southern Star did not pay workers' compensation premiums due and owing to the Fund for the period between May 1, 1994 and November 17, 1994, in the total amount of $230,849.00. On or about November 17, 1994, Southern Star's workers' compensation insurance was cancelled.

On December 23, 1994, several creditors of Southern Star filed a petition for involuntary bankruptcy under 11 U.S.C. Chapter 7 against Southern Star in this Court. On January 11, 1995, an order for relief was entered in the case. On January 23, 1995, Kenneth G.M. Mather was appointed Trustee of Southern Star's Chapter 7 bankruptcy estate ("the Trustee"), and has continued to serve in that capacity to the present date.

On March 17, 1995, the Fund filed its Proof of Claim, which was numbered as Claim No. 8, asserting a priority unsecured claim under 11 U.S.C. § 507(a)(3), (4) in the amount of $230,849.00. On May 16, 1995, the Trustee filed his objection to Claim No. 8 and a brief in support thereof, contesting only the priority status of the claim, and asking that it be allowed as a nonpriority ("general") unsecured claim in the amount of $230,849.00. On June 12, 1996, the Fund filed its ". . . Response . . . "thereto, abandoning any argument for priority status under 11 U.S.C. § 507(a)(3), conceding the nonpriority status of part of its original claim as specified below, but pressing its claim for priority status under § 507(a)(4) of the balance as specified below.

Southern Star did not cease business before the date of filing of the involuntary petition. Therefore, any priority claim of the Fund under § 507(a)(4) had to be incurred within 180 days of the date of filing of the involuntary petition, i.e. from June 26, 1994 forward. Of the Fund's total claim of $230,849.00, $43,950.73

was incurred before June 26, 1994, i.e. outside the 180-day priority period; and the balance of $186,898.27 was incurred from June 26, 1994 to November 17, 1994, i.e. inside the 180-day priority period.

On June 27, 1996, the Court held a status conference on the matter, and with the agreement of the parties issued a Scheduling Order providing for the filing of stipulations of fact, briefs and response briefs, upon which the matter would be submitted for decision. On July 19, 1996, the parties filed their joint "Stipulations of Facts For Trial." On July 31, 1996, each party filed a ". . . Supplemental Brief. . . "Further briefs were permitted on or before August 9, 1996; but none were filed. Thereafter, the Court took the matter under advisement.

CONCLUSIONS OF LAW

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), (O), 11 U.S.C. §§ 502(b), 507(a)(4).

The Fund concedes that the $43,950.73 incurred before June 26, 1994 should be allowed only as a general unsecured claim; but it argues that the balance of $186,898.27 should be allowed as a priority unsecured claim under § 507(a)(4). That statute grants fourth priority status to

> . . . allowed unsecured claims for contributions to an employee benefit plan . . . arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first . . .

The Fund proposes that unpaid workers' compensation insurance premiums are "contributions to an employee benefit plan" within

the meaning of this statute, citing *Employers Insurance of Wausau v. Plaid Pantries, Inc.*, 10 F.3d 605 (9th Cir. 1993). The Trustee argues that they are not, citing *In re HLM Corp.*, 62 F.3d 224 (9th Cir. 1995) *aff'g* 183 B.R. 852 (D. Minn. 1994) *aff'd* 165 B.R. 38 (Bankr. D. Minn. 1994).

As usual in disputes over the priority of claims, this Court finds itself "involve[d in] the thankless task of determining who should share the losses incurred by an unsuccessful business and how the values of the estate should be apportioned among creditors . . . ," S.Rep. No. 95-989 (1978) p. 10, U.S. Code Cong. & Admin. News (1978) pp. 5787, 5796. Priority status is not favored not because Bankruptcy Courts condone such conduct as nonpayment of workers' compensation premiums (for this Court certainly does not condone it), but because the most basic bankruptcy policy is equal treatment of creditors, *In re Hancock*, 137 B.R. 835, 837-838 (Bankr. N.D. Okl. 1992), and priority status violates that policy, by giving a few favored creditors better treatment than others. This is done for reasons of special expediency, *In re First Security Mortgage Co., Inc.*, 117 B.R. 1001, 1004 (Bankr. N.D. Okl. 1990). There is not enough money in Southern Star's estate to satisfy all claims of all the creditors of Southern Star; and

> To the extent one creditor's losses are mitigated by giving it a prior claim on inadequate estate assets, other creditors' losses will be aggravated,

id. citing *In re Mid Region Petroleum, Inc.*, 111 B.R. 968, 972 (Bankr. N.D. Okl. 1990). In such unfortunate circumstances, priority status is awarded only where it is so strongly deserved as to override the claims of all other creditors to equal treatment.

Appendix C

The issue is essentially whether the statutory phrase "contributions to an employee benefit plan" should be construed narrowly to exclude, or broadly to include, unpaid workers' compensation insurance premiums. The phrase appears to be a term of art, is undefined by the Bankruptcy Code itself, may be read either narrowly or broadly, and in these circumstances must be considered ambiguous, *In re Heckathorn,* 199 B.R. 188, 194-95 (Bankr. N.D. Okl. 1996).

Legislative history reveals that § 507(a)(4) was intended as a specific variation on § 507(a)(3). Subsection (3) grants third-priority status to claims within a fixed amount for "wages, salaries, or commissions. . ." Its predecessor under the former Bankruptcy Act was Sec. 64a(2). In *United States v. Embassy Restaurant, Inc.,* 359 U.S. 29, 79 S.Ct. 554, 3 L.Ed.2d 601 (1959), the United States Supreme Court held that Sec. 64a(2) did not apply to "contributions by an employer to a union welfare fund which are required by a collective bargaining agreement," and by extension to other "fringe benefits," 359 U.S. pp. 29, 33, 79 S.Ct. 554, 556, 3 L.Ed.2d pp. 602, 604. In the new Bankruptcy Code, former Sec. 64a(2) became new § 507(a)(3), supplemented by new subsection (a)(4).

> Paragraph (4) overrules *United States v. Embassy Restaurant* . . . which held that fringe benefits were not entitled to wage priority status. The bill recognizes the realities of labor contract negotiations, where fringe benefits may be substituted for wage demands. The priority granted is limited to claims for contributions to employee benefit plans such as pension plans, health or life insurance plans, and others . . The dollar limit placed on the total of all contributions payable under this paragraph is equal to the difference between the

> maximum allowable priority under paragraph (3) . . . times the number of employees covered by the plan less the actual distributions under paragraph (3) with respect to these employees,

S.Rep. No. 95-989, 95th Cong., 2nd Sess. (1978) p. 68, U.S. Code Cong. & Admin. News 1978, p. 5855.

That is, § 507(a)(4) was intended to grant priority status to such "claims for contributions to an employee benefit plan" as are in the nature of bargained-for wage substitutes or "fringe benefits," which are not within the letter of the previous § 507(a)(3) but are within its spirit.

This description does not fit claims for unpaid workers' compensation premiums. Workers' compensation is not bargained for by employees; it is required by the State. It cannot be bargained away; it is not a substitute for employee wages, but an obligation which employers must meet, no matter what wage levels they may pay. In this sense, the premium payments were primarily for Southern Star's own benefit.

The Fund describes Oklahoma's workers' compensation scheme as "social legislation," brief p. 16, but asserts that "there is no fund set up to pay the workers' compensation benefits in the case where the employer is not insured," *id.* p. 14. Southern Star did not meet its obligations to maintain current payments on workers' compensation insurance; the State of Oklahoma did not provide any remedy of its own for workers left uninsured. The question is whether Southern Star's general unsecured creditors should be forced (1) to bear the burden of Southern Star's mismanagement, and (2) to give their money (i.e., money which would otherwise be paid to them in partial satisfaction of their claims) to plug the gaps in Oklahoma's "social legislation". This Court perceives no reason why they should.

Appendix C

The Court concludes that 11 U.S.C. § 507(a)(4) was intended to be narrowly construed and applied to "fringe benefits" in lieu of wages, and was not intended to apply to unpaid workers' compensation premiums such as those claimed by the Fund in this case. Accord, *In re HLM* Corp., supra.

Accordingly, the Trustee's objection to priority status of Claim No. 8 of the State Insurance Fund is hereby sustained. Said claim is allowed in the amount claimed, but only as a general unsecured claim not entitled to priority.

AND IT IS SO ORDERED.

Dated: October 10, 1996

s/ Mickey D. Wilson
MICKEY D. WILSON, JUDGE
UNITED STATES BANKRUPTCY COURT

cc: Pamela H. Goldberg (Hall, Estill et al.)
Rodney Hayes (State Insurance Fund)